

**FATIMAH AHMAD v. ZABAIDAH MD HANEEF & ORS
AND ANOTHER CASE**

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[CIVIL SUIT NOS: PA-22NCvC-12-01-2023
& PA-22NCvC-32-03-2023]
5 APRIL 2024

Abstract – *When a land ownership is tainted with fraud and deceit, the title to the land becomes defeasible and such title and ownership can be challenged in court and potentially revoked. Even if a party purchases a land from a person with a fraudulent title, they might enjoy protection under the National Land Code if it could be proven and established that they are bona fide purchasers for valuable consideration, having bought the land in good faith and without any knowledge of fraud. However, a subsequent purchaser could not be said to have acted bona fide, as in this case, when there are suspicious circumstances surrounding the execution of the sale and purchase agreement and the subsequent transfer of the land.*

LAND LAW: *Ownership – Fraud – Dispute on ownership of land – Land office decided and ordered deceased's name to be registered as proprietor of land – Title of land remained in name of another individual despite decision of land office – Beneficiaries of individual sold land to company – Claim by beneficiary of estate of deceased – Whether beneficiaries of individual had committed fraud against beneficiaries of estate of deceased in respect of land – Whether beneficiaries of individual had knowledge of ownership of land by deceased – Whether beneficiaries of individual had indefeasible title over land*

LAND LAW: *Indefeasibility of title – Bona fide purchaser – Dispute on ownership of land – Land office decided and ordered deceased's name to be registered as proprietor of land – Title of land remained in name of another individual despite decision of land office – Beneficiaries of individual sold land to company – Whether beneficiaries of individual had indefeasible title over land – Whether company had indefeasible title over land – Whether company bona fide purchaser for valuable consideration – Whether company had knowledge of deceased's interest and dispute on land*

LAND LAW: *Vacant possession – Claim for – Dispute on ownership of land – Land office decided and ordered deceased's name to be registered as proprietor of land – Title of land remained in name of another individual despite decision of land office – Beneficiaries of individual sold land to company – Claim by company for vacant possession of land – Whether company had indefeasible title over land – Whether company bona fide purchaser for valuable consideration*

- A **LAND LAW: Damages – Dispute on ownership of land – Land office decided and ordered deceased’s name to be registered as proprietor of land – Title of land remained in name of another individual despite decision of land office – Beneficiaries of individual sold land to company – Claim by beneficiary of estate of deceased – Whether beneficiary entitled to claim general and aggravated damages**
- B In 1974, one Rokiah Abdullah (‘late Rokiah’) had issued a claim against one Bacha Kassim (‘late Bacha’) to dispute the ownership of the land in question. The Deputy Director of Land Titles decided and ordered that the late Bacha’s name be removed from the interim register of the land and that the late Rokiah’s name be registered as the proprietor on the full share of the land
- C (‘decision dated 16 September 1997’). Notwithstanding the decision dated 16 September 1997, which was not appealed against, the title of the land remained in the name of the late Bacha. The plaintiff was the daughter of the late Rokiah and was one of the 20 beneficiaries of the late Rokiah’s estate. The plaintiff contended that she and the other beneficiaries were the rightful owners of the said land, inheriting the same from the late Rokiah. On the other hand, the first and second defendants contended that they were the rightful owners of the said land having inherited the same from the late Bacha, who was their grandfather. Also in the mix was the third defendant who was the current registered proprietor of the said land pursuant to the execution of a sale and purchase agreement (‘SPA’) between them and the first and second defendants. There were two suits filed that had been consolidated, namely: (i) by the plaintiff against all three defendants (‘Suit No. 12’); and (ii) by the third defendant, seeking vacant possession of the land in which the plaintiff intervened in those proceedings (‘Suit No. 32’). Suit Nos. 12 and 32 were heard together and the judicial determination in
- F Suit No. 12 would have a consequential effect on the relief sought in Suit No. 32. The issues to be tried, as agreed by the parties, were: (i) whether the first and second defendants had committed fraud against the plaintiff in respect of the land. It was contended by the plaintiff that the first and second defendants were present and had testified during the rehearing in the Commissioner of Land Titles Office at KOMTAR in 1997, involving the claim of ownership by the late Rokiah; (ii) whether the third defendant had indefeasible title over the said land. The third defendant contended that it was a *bona fide* purchaser for valuable consideration. On the contrary, the plaintiff contended that the overwhelming evidence would lead one to the conclusion that the third defendant was not a *bona fide* purchaser for valuable consideration as the third defendant clearly had knowledge of the late Rokiah’s interest and the dispute over the land; (iii) whether the third defendant was entitled to vacant possession over the said land; and (iv) whether the plaintiff was entitled to claim general and aggravated damages against the defendants.
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Held (allowing Suit No. 12; dismissing Suit No. 32):

- (1) Having attended the rehearing in KOMTAR and defending the claim, it was implausible that the first and second defendants would not know thereafter about the outcome of the rehearing. Common sense would dictate that having taken the effort to defend the late Rokiah's claim and to testify at the enquiry/rehearing, the first and second defendants would have been keen and would have known the outcome of the rehearing. Further, both the first and second defendants admitted that a solicitor was appointed for the proceedings involving the determination of the land belonging to the late Rokiah. The final decision/order would have been provided or communicated to the said solicitor and such knowledge about the final decision/order could be derived from the knowledge of their solicitor. It was clear that it had been conclusively decided and determined that the late Rokiah was the legal and beneficial owner of the said land, and furthermore, this decision was within the knowledge of the first and second defendants. The defendants' attempt, in still trying to persuade the court that the late Bacha was the legal owner of the said land could not be entertained as it was simply too late in the day in light of the decision dated 16 September 1997. The plaintiff had successfully proven that the first and second defendants had committed fraud when they obtained a vesting order in 2011 and subsequently vested the land in their names and thereafter selling the said land to the third defendant when at the material time, the first and second defendants were aware that they were not the beneficial owners. The first and second defendants' title over the land was defeasible. (paras 39, 40, 42, 47 & 49)
- (2) Clause 2(b) of the SPA provided for the first and second defendants to obtain the sanction of the court for the purpose of the sale (to the third defendant) but none appeared to have been obtained. The payment of the purchase price was also sketchy following the discrepancies in the actual amount paid by the third defendant to the first and second defendants. There was a gap of many years between the execution of the SPA between the first and second defendants and the third defendant. In cases of sale and purchase, it was common for the purchaser to want to have his name registered on the title as soon as possible but this was not the case here. Further, the third defendant as a reasonable and prudent purchaser ought to have taken the ordinary precaution to investigate and conduct a search on the title of the land before executing the said agreement. Quite clearly, there were encumbrances on the said land and if the third defendant were to conduct a land search, the plaintiff's private caveat would be reflected on the search. The Form 19B affirmed by the plaintiff would also give the third defendant sufficient knowledge

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- A that there were allegations of fraud and suspicions and uncertain circumstances. Based on the facts and circumstances surrounding the execution of the SPA and the subsequent transfer of the land to the third defendant, the third defendant failed to satisfy that it was a *bona fide* purchaser for valuable consideration. (paras 64-68)
- B (3) The third defendant was not entitled to vacant possession given that such registration was defeasible. (paras 71)
- (4) It was clear that from the sale of the land to the third defendant, the estate of the late Rokiah had been deprived of the use and enjoyment of the land. Although no damage was shown but if the amount suffered is not proven sufficiently or at all, a court would usually award nominal damages and this was done in this case as no damages had been proven. The court awarded nominal damages of RM1,000 and allowed costs of RM20,000 to be paid by the first and second defendants to the plaintiff subject to allocatur. (paras 76 & 78)
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Case(s) referred to:

- Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 FC (*refd*)
Antonina Marleen Yarendraw v. Chai Wei Chung [2017] CLJU 536; [2017] 1 LNS 536 CA (*refd*)
Bluefire Development Sdn Bhd v. Tan Mei Li & Ors [2018] CLJU 455; [2018] 1 LNS 455 HC (*refd*)
Chin Min Hua & Ors v. Eagaivallinayagi Ammal [2023] 5 CLJ 445 HC (*refd*)
Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd [2007] 6 CLJ 538 CA (*refd*)
Facial Complex Sdn Bhd v. Bank Simpanan Nasional [2022] CLJU 1245; [2022] 1 LNS 1245 HC (*refd*)
Ib Capital Sdn Bhd v. Ivory Indah Sdn Bhd & Anor [2021] CLJU 2348; [2021] 1 LNS 2348 CA (*refd*)
Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] CLJU 199; [1980] 1 LNS 199 FC (*refd*)
Koperasi Kastam Diraja Malaysia Bhd v. Yi Go Group Sdn Bhd [2021] 10 CLJ 31 CA (*refd*)
Lee Siok Ching v. Eden Realty Sdn Bhd & Ors [2021] CLJU 901; [2021] 1 LNS 901 HC (*refd*)
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC (*refd*)
Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC (*refd*)
Mohd Najid Yusof v. Mak Offshore Sdn Bhd & Ors [2023] CLJU 512; [2023] 1 LNS 512 HC (*refd*)
See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal [2021] 6 CLJ 650 FC (*refd*)
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC (*refd*)
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA (*refd*)
Sulaiman Ahmad & Ors v. Jemain Mohamed & Ors [2020] 7 CLJ 820 HC (*refd*)

T Sivam Tharamalingam v. Public Bank Bhd [2018] 6 CLJ 1 FC (*refd*)
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC (*refd*)
Tama Lamada v. Hariwood Sdn Bhd & Anor [2016] 1 LNS 565; [2016] CLJU 565 HC (*refd*)

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Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC (*refd*)
Teh Bee v. K Maruthamuthu [1977] CLJU 134; [1977] 1 LNS 134 FC (*refd*)

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Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103

Limitation Act 1953, ss. 9, 29

National Land Code, ss. 89, 340(2)(a), (3), 378

(Civil Suit No: PA-22NCvC-12-01-2023)

For the plaintiff - Cheong Yew Sheng & Khaw Yit Hao; M/s BC Teh & Yeoh

For the defendants - Abd Rahim Mohamed; M/s Tung, Chan & Partners

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(Civil Suit No: PA-22NCvC-32-03-2023)

For the plaintiff - Abd Rahim Mohamed; M/s Tung, Chan & Partners

For the defendants - Cheong Yew Sheng & Khaw Yit Hao; M/s BC Teh & Yeoh

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Reported by Lina E

JUDGMENT

Anand Ponnudurai J:

Introduction

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[1] Central to this case is a piece of land identified as Lot 11, Bandar Georgetown, Seksyen 5, Daerah Timor Laut, Pulau Pinang and held under Geran No. 110388 (hereinafter referred to as the “said land”). On the one hand, the plaintiff, Fatimah binti Ahmad contends that she and other beneficiaries are the rightful owners of the said land inheriting the same from her late mother, Rokiah binti Abdullah. On the other hand, the first and second defendants contend that they are the rightful owners of the said land having inherited the same from the late Bacha bin Kassim (hereinafter referred to as “the late Bacha”) who was their grandfather.

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[2] Also in the mix is the third defendant, Khoon Development Sdn Bhd who is the current registered proprietor of the said land pursuant to the execution of a sale and purchase agreement dated 11 July 2014 between them and the first and second defendants.

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[3] There are currently two suits filed that have been consolidated pursuant to the consent order dated 8 May 2023. In Suit No. PA-22NCvC-12-01-2023 (hereinafter referred to as “Suit No. 12”), the plaintiff, Fatimah binti Ahmad had commenced such proceedings against the three defendants seeking the following reliefs:

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- A (i) an order that the sale of Lot 11, Bandar Georgetown, Seksyen 5, Daerah Timor Laut, Pulau Pinang and held under Geran No. 110388 *vide* sale and purchase agreement dated 11 July 2014 between the defendants is set aside;
- B (ii) a declaration that the vesting order obtained on 21 September 2011 which was registered *vide* Perserahan No. 0799B2019010875 on 18 October 2019 on Lot 11, Bandar Georgetown, Seksyen 5, Daerah Timor Laut, Pulau Pinang and held under Geran No. 110388 is null and void;
- C (iii) an order that the name Rokiah binti Abdullah (No. K/P: 1844174) be registered on the title as the registered proprietor of the said land;
- (iv) land office gives effect to these orders; and
- (v) damages.
- D [4] Prior to the filing of Suit No. 12, Khoon Development Sdn Bhd had commenced proceedings in the Georgetown Sessions Court on 16 November 2021 *vide* Suit No. PA-A52NCVC-162-11-2021 seeking vacant possession of the said land in which Fatimah intervened in those proceedings. However, in light of Suit No. 12 above, the parties have agreed that the said Sessions Court proceedings be transferred to the High Court and a consent order was recorded that that suit with a new number of PA-22NCVC-32-03-2023 (hereinafter referred to as "Suit No. 32") be consolidated and heard with Suit No. 12. As such, both suits are being consolidated and heard together.
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- F [5] In determining the merits of the respective parties' claim in Suit Nos. 12 and 32, it is appropriate that I set out the chronology of facts followed by the parties' rival contentions, the issues to be tried and my analysis of the same.

Chronology Based On Agreed Facts/Undisputed Facts

- G [6] The chronology of events as agreed by the parties are as follows.
- H [7] The plaintiff is the daughter of the late Rokiah binti Abdullah and is one of 20 beneficiaries of the late Rokiah's estate as seen in the faraid certificate dated 9 June 2022 with each being recognised as holding a different proportion of shares in the late Rokiah's estate with the plaintiff and her sister, Habsah binti Ahmad holding the biggest share of 19800/47520 each.
- I [8] Pursuant to a claim by the late Rokiah and pursuant to an enquiry thereafter at the Commissioner of Land Titles Office in KOMTAR, *vide* an order by the Deputy Director of Land Titles dated 16 September 1997, the late Rokiah was determined and recorded as well as recognised as the beneficial owner of the said land. The chronology of events relating to the late Rokiah's claim leading to the order by the Deputy Director of Land Titles were as follows:

Date	Events	
6th January 1974	The late Rokiah issued a claim against the late Bacha to dispute the ownership of the said land in Form E.	A
16th August 1974	An interim register for the said land was issued.	B
30th March 1977	Hearing of the claim commenced by the late Rokiah at the Commissioner of Land Titles Office.	
8th April 1978	It was subsequently ordered that the late Bacha's name be removed from the interim register of the said land and the late Rokiah be registered as the proprietor of the full share of the said land.	C
5th May 1978	The late Bacha's son Md Haniff bin K Batcha filed an appeal against the above Order of the Commissioner of Land Titles (hereinafter referred to as "the First Appeal").	D
27th October 1983	The First Appeal was dismissed.	
31st October 1983	Md Haniff bin K Batcha appealed to the Penang High Court (hereinafter referred to as "the Second Appeal") on the decision of the First Appeal.	E
7th September 1987	Md Haniff bin K Batcha passed away.	
13th June 1991	Rokiah passed away.	F
21st July 1995	The Penang High Court decided on the Second Appeal and ordered that a new investigation/enquiry be carried out on the claim. The 2nd Defendant (DW1) was a party to the Second Appeal as the representative of Md Haniff bin K Batcha.	G
2nd July 1997	The claim was reheard in the Commissioner of Land Titles Office at KOMTAR in the presence of the Plaintiff and the 2nd Defendant (DW1) (hereinafter referred to as "the Rehearing").	H
16th September 1997	The Deputy Director of Land Titles decided and ordered that the late Bacha's name be removed from the interim register of the said land and the late Rokiah's name be registered as the proprietor on the full share of the said land.	I

[10] It is perhaps pertinent and helpful to set out the title search which will then reflect the various registration/endorsements and their timelines on the said land as follows:

Isih das Ma. Iskandil	: GRN 10000	Number Lal	: Lal 81 Sukayen II
Bender/Pelabuhan	: Bandar George Town	Tempat	:
Kekanan	: 0.052 Hektar	Daerah	: Tasek Lela
Number Syil Pawai	: 11.8-4	Number Pawai Alah	: 4343
Tarif Pajagaan	: Selamu-basangs	Terdah Lipat Pajalan	:
<i>(Selalu basangs oleh Pajalan)</i>		<i>(Dike basangs)</i>	
Kewanan Kitab	: Thale		
<i>(Dike basangs)</i>			
Tarikat Daftar	: 1 September 1999	Catut Teras	: RMC 229.00

Kategori Kegiatan Tahun	Tugas
Syarat Nyata	(FIRST GRADE) The Land comprised in this title : (a) shall not be affected by any provision of the National Land Code limiting the compensation payable on the exercise by the State Authority of a right of access or one conferred by Chapter 3 of Part Three of the Code or on the creation of a Land Administrator's right of way ; and (b) subject to the implied condition that land is liable to be re-entrained if it is abandoned for more than three years shall revert to the State only if the proprietor for the time being dies without heirs; and the title shall confer the absolute right to all forest produce and in all oil, mineral and other natural deposits on or below the surface of the land (including the right to work or extract any such produce or deposit and remove it beyond the boundaries of the land)
Sekolah Kependidikan	Tugas

Huile n° 62	27/01/2009
N° de manut.	1 1 3 3
Tarifs	27/01/2009

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Pemilik dan Alamat :

KHOON DEVELOPMENT SDN. BHD. , l/i sbgn.
No Syarikat : 501800-T, Terletak di bawah Aka Syarikat 1965,
ROOM 602, 6TH FLOOR, NO. 22, JALAN MASJID KAPITAN KELING, 10200 GEORGETOWN PULAU PINANG

Tanggungan dan endusan-endusan lain :

No Pers 0799B2020000007 Disediakan oleh Tanah
oleh ZASAIIDAH BINTI MD HANEEF ,No. Kad pengenalan : 591030-07-5048 ,1/2 bahagian
ZAHAL AJIDEN BIN MD HANEEF ,No. Kad pengenalan : 610834-07-5071 ,1/2 bahagian
kepada KHOON DEVELOPMENT SDN. BHD. ,No. Syarikat : 501800-T, l/i bahagian
ROOM 602, 6TH FLOOR, NO. 22, JALAN MASJID KAPITAN KELING, 10200 Pulau Pinang
didaftarkan pada 8 Februari 2020 jam 03:11:20 petang

No Pers 0799B202000000631 Kaveat Pendaftaran atas Tanah
didaftarkan pada 14 October 2020 jam 11:13:01 pagi
(No Rajukan Fail : PTG/PHMTAC/511/87 (71) RUJ; PTGPP/PHMT/712 (58))

No Pers 0799B202000000626 Kaveat Pendaftaran atas Tanah
oleh FATMAH BINTI AHMAD No. Kad pengenalan : 491105075316
380 KAMPUNG BARU, 11400 AYER ITAM, PULAU PINANG
didaftarkan pada 22 October 2020 jam 03:50:03 petang

Urutan-urutan dalam Penerimaan yang belum didaftarkan : Tidak

Endusan-endusan yang terdabahu yang tidak berkuatkuasa lagi :

No Penerimaan 0799B2018013807 Kaveat Pendaftaran atas Tanah
oleh FATMAH BINTI AHMAD No. Kad pengenalan : 491105075316
NO 380 KAMPUNG BARU, JALAN AIR ITAM, 11400 Pulau Pinang
didaftarkan pada 24 Ogos 2018 jam 01:09:30 petang

No Penerimaan 0799B2012044753 Kaveat Pendaftaran atas Tanah
didaftarkan pada 10 April 2012 jam 11:10:23 pagi

No Penerimaan 0799B20180000956 Kaveat Pendaftaran atas Tanah
oleh KHOON DEVELOPMENT SDN. BHD. No. Syarikat : 501800-T
ROOM 602, 6TH FLOOR, NO. 22, JALAN MASJID KAPITAN KELING, 10200 GEORGETOWN,
PULAU PINANG
didaftarkan pada 5 September 2018 jam 08:14:22 pagi

No Penerimaan 0799B2018001702 Pembatalan Endusan Usang (Joh 387)
didaftarkan pada 18 September 2018 jam 03:10:54 petang

No Penerimaan 0799B2019010875 Perpetakhabas Oleh Mahkamah Atas Tanah
mengikut Perintah MAHKAMAH TINGGI MALAYA PULAU PINANG
no sahkanah bernombor 21 September 2019
didaftarkan pada 18 Oktober 2019 jam 02:55:52 petang

No Penerimaan 0799B2020001287 Tarikbalik Kaveat Pendaftaran (Withdrawal)

Dikemuka : 0799B20200010000
Maklumat : 2, 1, 3, 1
Tarikh : 27/11/2020

Kaveat Pendaftaran atas Tanah No Pers 0799B2018008556
didaftarkan pada 6 Februari 2020 jam 03:11:18 petang

Hakmilik yang terdabahu :
(Atas hakmilik sahkanah)

Tanah mula ditermilk	:	
Hakmilik Asal (Tetap atau Semestah)	:	Bandar George Town END 2
Hakmilik sebahagian daripada	:	Bandar George Town IR 11
Perkara lain yang melibatkan hakmilik	:	Tidak
Didaftarkan pada	:	3:54:18 petang
Tarikh	:	27 November 2020
Rujukan dijelaskan	:	RM 60.00
Nombor Rasit	:	201127991105065

A [11] Upon conclusion of trial and upon the unfolding of evidence and based on the same, the plaintiff in their written submission has helpfully provided a narrative of the factual background relating to the said land and the sale by the first and second defendants to the third defendant which they accurately summarised as follows:

B		Date	Events
		Around 2000	The Defendants started to negotiate on the sale and purchase of the said land.
C		24th August 2010	The Plaintiff entered a private caveat on the said land.
D		2011	The 3rd Defendant <i>via</i> DW3 appointed Mr Rajendran (PW1) as their solicitor for the sale and purchase of the said land and allegedly executed a sale and purchase agreement in the year 2011.
E		22nd June 2011	The 3rd Defendant paid a deposit of 10% for the purchase price to the 1st and 2nd Defendants' former solicitor, Messrs Hassan Subra & Associates and DW3 executed the sale and purchase agreement.
F		10th August 2011	The 1st and 2nd Defendants <i>via</i> Hassan Subra filed an Originating Summons in the Penang High Court for a vesting Order to have their names registered onto the said land. The 1st Defendant had affirmed an affidavit to support that application and affirmed that she was affirming it on behalf of the 2nd Defendant.
G		21st September 2011	The Penang High Court granted a vesting Order. However, from a perusal of the registered title, this vesting Order was only registered on 18th October 2019.
		10th April 2012	The 3rd Defendant <i>via</i> PW1 attempted to lodge a private caveat on the said land.
H		13th April 2012	The Penang Land Office informed PW1 that the 3rd Defendant's private caveat could not be registered and requested PW1 to rectify it within 14 days.
I		12th June 2012	The Penang Land Office rejected the 3rd Defendant's private caveat due to the failure to comply with its requirements.

11th July 2014	The sale and purchase agreement was officially executed and dated 11th July 2014 between the 1st and 2nd Defendants as vendors and the 3rd Defendant as the purchaser in respect of the said land. (However, it is to be noted that DW3 had testified that the sale and purchase agreement was executed by him in the year 2011) It is also interesting to note that the sale and purchase agreement provides that a vesting Order has to be obtained and this is peculiar because a vesting Order had already been obtained on 21st September 2011.	A
5th September 2018	The 3rd Defendant lodged a private caveat on the said land.	B
14th May 2019	A Memorandum of Transfer (Form 14A) in respect of the said land was executed by the Defendants.	C
18th October 2019	DW1 and DW2's names were registered in furtherance of the vesting Order dated 21st September 2011.	D
6th February 2020	The said land was transferred from the 1st and 2nd Defendants to the 3rd Defendant whereby the 3rd Defendant is currently the registered owner of the said land.	E
14th October 2020	A Registrar's caveat was entered on the said land.	F

[12] On 4 September 2020, the third defendant *via* its solicitors Messrs Tung, Chan & Partners issued a notice to quit to the occupiers of the said land.

[13] Upon the receipt of the notice, the plaintiff lodged a new private caveat on the said land on 22 October 2020.

[14] On 16 November 2021, the third defendant commenced proceedings in the Georgetown Sessions Court to claim vacant possession and mesne profit against the plaintiff which has since been transferred and registered now as Suit No. 32.

[15] The plaintiff having obtained the faraid certificate in the Syariah Court on 9 June 2022 commenced Suit No. 12 against the defendants to set aside the third defendant's registered title on the said land pursuant to ss. 340(2) and (3) of the National Land Code and claim damages from the first and second defendants for fraud perpetrated in transferring the said land to the third defendant as well as the tort of deceit.

A Trial

[16] The trial took place over two days with two witnesses testifying for the plaintiff and three witnesses testifying for the defendants respectively. The list of witnesses who testified are as follows:

B Plaintiff's witnesses:

- (i) Rajendran a/l Ramasundram (Subpoena witness) – PW1; and
- (ii) Fatimah binti Ahmad – PW2. Witness statement – WSPW2.

Defendants witnesses:

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- (i) Zainal Abidin bin Md Haniff – DW1. Witness statement – WSDW1;
 - (ii) Zabaidah binti Md Haneef – DW2. Witness statement – WSDW2; and
 - (iii) Koay Hean Khoon – DW3. Witness statement – WSDW3.

D Issues To Be Tried

[17] Having complied with the court's directions prior to trial with the filing of a common bundle of documents where the documents were categorised as either part A or B, the parties had also agreed prior to trial that the issues to be tried in this matter which require judicial determination are as follows:

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- (i) whether the first and second defendants have committed fraud against the plaintiff in respect of the said land;
 - (ii) whether the third defendant has indefeasible title over the said land;
- F**
- (iii) whether the third defendant is entitled to vacant possession over the said land; and
 - (iv) whether the plaintiff is entitled to claim general and aggravated damages against the defendants?

G Parties Contentions/Submissions

The Plaintiff's Contentions/Submissions

[18] The plaintiff's contentions/submissions are summarised as follows:

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- (i) that the first and second defendants had committed fraud by selling and transferring the said land to the third defendant contrary to the decision made by the Deputy Director of Land Titles on 16 September 1997;
 - (ii) that the plaintiff's claim against the first and second defendants is based on the tort of deceit as the said land has already been disposed and transferred to the third defendant and the only remedy available against the first and second defendants is damages;
- I**

- (iii) that the second defendant having attended the enquiry in 1997, had sufficient knowledge of the ownership of the said land belonging to the late Rokiah prior to the sale to the third defendant; A
- (iv) that the first and second defendants are not credible witnesses;
- (v) that the first and second defendants have committed fraud when they knowingly sold the said land to the third defendant and even if assuming that they have no knowledge of the actual decision dated 16 September 1997, they were certainly aware of the ongoing legal dispute concerning the said land and the claim by the late Rokiah; B
- (vi) that the defendants were aware of the said private caveat registered by the plaintiff on the said land on 24 August 2010 but no attempts were made to remove the said private caveat; C
- (vii) that the first and second defendants obtained a vesting order dated 21 September 2011 despite having knowledge of the late Rokiah's claim as well as the private caveat registered by the plaintiff and only registered their names on the title of the said land on 18 October 2019 after the plaintiff's private caveat had lapsed; D
- (viii) that the defendants had knowledge of the plaintiff's private caveat before executing the sale and purchase agreement with the third defendant in respect of the said land; E
- (ix) that there was an unexplained delay of many years to transfer the said land to the third defendant despite the sale and purchase agreement being executed on 11 July 2014;
- (x) that the third defendant is not a *bona fide* purchaser for valuable consideration; and F
- (xi) that the third defendant does not have an indefeasible title to the said land and as such is not entitled to vacant possession of the said land.

The Defendants' Contentions/Submissions

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[19] The defendants' contentions/submissions are summarised as follows:

- (i) that the plaintiff does not have the *locus standi* to commence this present suit as she has not obtained letters of administration for the late Rokiah's estate; H
- (ii) that the plaintiff is estopped by the principles of laches and acquiescence due to her delay in filing this claim;
- (iii) that the plaintiff's claim is barred by the Limitation Act 1953;
- (iv) that there is no fraud committed by the defendants and they have indefeasible title of the said land; and I

- A (v) that the third defendant is a *bona fide* purchaser for valuable consideration and the third defendant has indefeasible title of the said land.

[20] I will hereinbelow deal with the abovementioned issues separately. However, before I proceed to do so, I am mindful that it is trite law that he who asserts must prove the particular facts he alleges. As such, the burden of proof lies on the plaintiff throughout the trial to prove her claim that the defendants committed fraud in respect of the transfer of the said land and similarly the plaintiff in Suit No. 32 has to prove that they are the *bona fide* purchaser for valuable consideration and entitled to vacant possession. The parties need only prove the above on a balance of probabilities. (See ss. 101, 102 and 103 of the Evidence Act 1950 and cases of *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1980] 1 MLRA 385; *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 3 MLRA 501 and *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147).

[21] It is to be noted that since Suit Nos. 12 and 32 are to be heard together, the judicial determination in Suit No. 12 will have a consequential effect on the relief sought in Suit No. 32. As such, I will hereinbelow predominantly deal with the issues in relation to Suit No. 12 and the conclusion and determination made therein will have a direct and consequential effect on the claim in Suit No. 32 for vacant possession.

[22] In fact, I noted that whilst parties have complied with all necessary directions and filed the necessary documents in Suit No. 12 in preparation for trial, in relation to Suit No. 32, nothing has been filed after the close of pleadings and the transfer and consolidation order dated 8 May 2023. Therefore, quite clearly, the determination of the issues in Suit No. 12 will determine whether or not Khoon Development Sdn Bhd (third defendant in Suit No. 12) is entitled to vacant possession as sought.

[23] However, before I proceed to deal with the issues to be tried as agreed between the parties as highlighted in para. 17 above, I will first deal with three issues raised by the defendants in their written submission which were not included in the list of issues to be tried and these are:

- H (i) the *locus standi* of the plaintiff;
(ii) principles of laches and acquiescence; and
(iii) limitation.

[24] First and foremost, notwithstanding that the abovementioned issues were pleaded, the plaintiff contends now that these matters ought not to be considered as they have been deemed to have been abandoned and are not live issues as they have not been included in the list of issues to be tried. In

this regard, the plaintiff relies on the decision of the High Court in *Tama Lamada v. Hariwood Sdn Bhd & Anor* [2016] CLJU 565; [2016] 1 LNS 565 where it was held as follows:

[14] There was yet another reason why the 1st defendant was precluded from requiring either the plaintiff or the 2nd defendant to adduce evidence of the creation of NCR in the land in question. The question of whether the Pulau Engkabang is NCR land was simply not a live issue between the parties. A reading of the Common Agreed issues to be tried *ie*, Bundle E would reveal that this issue was not included. In my judgment, the non-inclusion of this issue in Bundle E meant that the parties never intended it to be an issue for determination at the trial. I would interpolate that the reason for not including this as an issue to be tried is obvious – the parties very well knew that it is a fact deemed admitted by the pleadings. It will be recalled that pre-trial case management (PTCM), the parties were directed, amongst others, to formulate and settle the issues requiring determination at the trial. These directions were issued pursuant to the provisions of O. 34 r. 2 of the Rules of Court 2012. To my mind, the parties were bound by the agreement that they had reached at PTCM on any fact or issue that they had settled or formulated. The whole meaning of the regime of PTCM under O. 34 r. 2 is to narrow the parties to definite issues, and thereby diminish expense and delay especially as regards *the amount of testimony required on either side at the hearing. The issues to be tried that were agreed and settled between the parties before trial are analogous to the pleadings, if not an integral part. As they are matters that have been agreed by the parties, in my judgment, it would be against all tenets of fair play to allow any party to resile or renege from what had been agreed.* In my opinion the pronouncement of the Federal Court in *Anjalai Ammal v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22 FC that *a judge should not depart from the strict rules of procedure in deciding the case on an issue not raised in the pleadings applies with equal force to the agreed issues to be tried.* (emphasis added)

[25] In my view, there certainly appears to be merit in the plaintiff's contention that the above three issues are not live issues in that the parties never intended them to be issues for determination at trial and that the issues to be tried as agreed are integral to the proceedings and it will be unfair to allow a party to go beyond the scope of what was agreed to be the issues to be tried.

[26] However, notwithstanding, since those three issues were in fact pleaded, in abundance of caution, I would nonetheless deal with these three issues.

[27] On the issue of the alleged lack of *locus standi*, it is not disputed that the plaintiff is indeed one of the beneficiaries of the late Rokiah and this is evidenced by the faraid certificate dated 9 June 2022. The defendants however contend that she has not obtained the letters of administration. However, I do note that the defendants have in their written submission subsequently seemed to concede that the faraid certificate does afford the

A plaintiff the necessary *locus standi* but then questions why the faraid certificate was obtained only in the year 2022 and no explanation was given for the 31 years delay in obtaining it bearing in mind that Rokiah had passed away in June 1991. In my view, any alleged delay in obtaining the faraid certificate does not detract from the fact that the plaintiff does indeed have
B the necessary *locus standi* to commence these proceedings. In this regard, it is apt that I refer to the Federal Court case of *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 and the High Court case of *Sulaiman Ahmad & Ors v. Jemain Mohamed & Ors* [2020] 7 CLJ 820 which stand for the proposition that there existed special circumstances for the beneficiaries to
C commence legal action against the defendants *qua* beneficiaries to protect and preserve the assets of the estate and the beneficiaries have the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the estate's assets.

[28] On the issue of laches and acquiescence, the defendants take issue with
D the fact that despite the plaintiff being aware of the decision by the land office on 16 September 1997, the plaintiff had done nothing to ensure that the name of the late Rokiah was registered on the said land pursuant to s. 378 of the National Land Code. However, the plaintiff has testified that she was not
E sure of the process and was waiting for the letter from the land office and for the land office to do the necessary in respect of the registration in the name of the late Rokiah. In any event, in my opinion, there was no inordinate delay or basis for me to conclude that laches and acquiescence are applicable in this case considering the fact that the plaintiff had indeed lodged a private caveat on the said land as early as 2010.

F [29] Further, and in any event, it is trite law that those who seek to rely on the equitable doctrine of laches must themselves come to court with clean hands and cannot rely on these principles if they have acted fraudulently, recklessly, or with total disregard to the rights of another person or acted in bad faith. (See the cases of *Eastern Properties Sdn Bhd v. Hampstead Corporation Sdn Bhd* [2007] 6 CLJ 538 and *Bluefire Development Sdn Bhd v. Tan Mei Li & Ors* [2018] CLJU 455; [2018] 1 LNS 455).
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[30] In respect of the issue of limitation, I firstly note that the defendants have not filed an application to strike out the claim which is the ordinary course of action taken by parties in cases where limitation has been pleaded
H in their defence.

[31] The defendants now contend that s. 9 of the Limitation Act 1953 provides a limitation period of 12 years for causes of action based on the recovery of land. It is thus contended by the defendants that since the plaintiff lodged her initial caveat on the said land in 2010 which they contend was
I the date she knew the date to register her name, the suit filed in 2023 is clearly out of time.

[32] With respect, I am unable to accede to the defendants' contention and do not agree that limitation has set in. I say this because the central issue in this case does not relate to the non-registration of the late Rokiah's name on the title. In this regard, it is not disputed that it is the plaintiff's case that the first and second defendants fraudulently sold the said land to the third defendant knowing full well that the said land belongs to the late Rokiah. In my view, the plaintiff was certainly not aware of the fraud in 2010. Any fraud could only have been discovered in 2019 which is the date the vesting order to the first and second defendants were registered on the title on 18 October 2019 or even at a later date.

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[33] As such, in accordance with s. 29 of the Limitation Act 1953, the cause of action accrues at the time the date the plaintiff discovered the fraud and, in this case, it could not have been prior to 2019. Therefore, in my view, no limitation has set in and the plaintiff's claim is very much within time.

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[34] Having disposed of the above three issues of which I find no merits in the defendants' contentions, I will now proceed to analyse those issues that have been agreed upon by the parties.

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First Issue: Whether The First And Second Defendants Have Committed Fraud Against The Plaintiff In Respect Of The Said Land

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[35] It is trite that in civil cases, the plaintiff bears the burden of proving the elements of fraud on a balance of probabilities as seen in the case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 where the Federal Court enunciated as follows:

The position of the law on the standard of proof for fraud in civil claims in this country was far from satisfactory and the time had come to realign the position with the standard applied in other common law jurisdictions. The correct principle to be applied was as explained in *In re B (Children) (Care Proceedings: Standard of Proof)* (CAFCASS intervening) [2008] UKHL 35 and it was this:

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that at law there were only two standards of proof, namely, beyond reasonable doubt for criminal cases while it was on the balance of probabilities for civil cases. As such, *even if fraud was the subject in a civil claim, the standard of proof was on the balance of probabilities*. There was no third standard; and '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts (per *Baroness Hale of Richmond* in *In re B (Children)* (see paras 47-49 & 51). (emphasis added)

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[36] It is trite that whether fraud exists is a question of fact to be decided upon the circumstances of each case. In *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381, the Federal Court held as follows:

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- A 4851. The term *common law fraud* is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit is said to encompass cases where the defendant knowingly recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.
- B 4852. *Derry v. Peek* [1889] UKHL 1; [1889] 14 App Cas 337 illustrates the principle that honesty is a duty of universal obligation, existing independently of contract or fiduciary obligations. In *Derry v. Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, their Lordships set the standard for common law fraud. Lord Herschell said,
- C at 374, that to succeed, a plaintiff must prove ‘that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false’. In other words, there must be a lack of an honest belief in the truth of the representation. In *Armitage v. Nurse* [1997] EWCA Civ 1279; [1998] Ch 241; [1997] 3 WLR 1046, Millett LJ discussed the meaning of ‘actual fraud’ in the context of an exemption clause. At 1053, his Lordship described actual fraud as connoting, at least,
- D ‘an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.’
(emphasis added)
- E [37] It is the plaintiff’s contention that the second defendant was present and had testified during the rehearing in the Commissioner of Land Titles Office at KOMTAR in 1997 involving the claim of ownership by the late Rokiah. A perusal of the notes of proceedings of the Land Titles Office on 2 July 1997 as produced at pp. 42 to 44 of the bundle of document will reveal
- F and confirm that the second defendant had attended the enquiry and had testified at the same to oppose the late Rokiah’s claim. In fact, the second defendant (DW1) also admitted during cross-examination that he attended the rehearing at KOMTAR sometime in 1997. (See p. 113 of the notes of proceedings dated 6 December 2023).
- G [38] As for the first defendant (DW2), although she claims that she has no knowledge about the rehearing and the dispute about the ownership of the said land, the second defendant (DW1) had testified during re-examination that DW2 has also attended the rehearing with him. Hence, DW2’s evidence that she was not aware of the claim by the late Rokiah is evidently not true.
- H (See pp. 179 and 180 of the notes of proceedings dated 6 December 2023).
- I [39] In my view, having attended the rehearing in KOMTAR and defending the claim, it is implausible that the first and second defendants would not know thereafter about the outcome of the rehearing. Common sense would dictate that having taken the effort to defend the late Rokiah’s claim and to testify at the enquiry/rehearing, the first and second defendants would have been keen and would have known the outcome of the rehearing.

[40] Further and in any event, it is to be noted that both the first defendant (DW2) and the second defendant (DW1) had admitted that one Mr Darshan Singh (since deceased) was appointed as their solicitor for the proceedings involving the determination of the said land belonging to the late Rokiah. The said final decision/order would have been provided or communicated to Mr Darshan Singh and as such even if I were to accept the defendants' contention that they have no knowledge of the said order (which I do not) such knowledge and/or imputed knowledge about the final decision/order can be derived from the knowledge of their solicitor.

[41] In any event, it is trite law that the knowledge of solicitors is to be regarded as the client's. In the case of *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1, the Federal Court held as follows:

(5) The general law of principal and agent is applied to the actual facts herein to answer the question as to whether the knowledge of the solicitor should be imputed to the chargee bank. Imputed knowledge, where it operates, deems the principal to have the actual knowledge, which the agent has. It is irrefutable that the relationship between the defendant and the solicitor was that of a principal and agent. It is well settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client so that it is not open to the client to say that the solicitor did not disclose the true facts to him.

(emphasis added)

[42] As such, in my opinion and view, from the above, it is clear to me that it has been conclusively decided and determined that the late Rokiah is the legal and beneficial owner of the said land and furthermore this decision was within the knowledge of the first and second defendants. In my further view, the defendants attempt in still trying to persuade me now that the late Bacha was the legal owner of the said land cannot be entertained by the court as it is simply too late in the day in light of the decision of the Deputy Registrar of the Land Titles Office in 1997. The proper recourse at that material time ought to have been an appeal in respect of the decision in 1997 as they had done in relation to the first decision in 1978.

[43] The defendants in their submissions then contend that the plaintiff had the recourse to register the name of the late Rokiah on the title pursuant to s. 378 of the National Land Code but that this was never done by the plaintiff. I do agree that it would appear that the plaintiff did not take steps immediately to have the late Rokiah's name registered on the title of the said land but nevertheless, this in my view does not in any way prohibit the estate of the late Rokiah from being entitled to the said land especially in a case where there is an allegation of fraud perpetrated. In any event, a perusal of s. 378 of the National Land Code does not seem to place a mandatory obligation on an owner to rectify the register. Section 378 of the National Land Code reads as follows:

A 378. Changes of name by proprietors, *etc.*

The Registrar may, upon the production to him of evidence (whether in the form of a deed poll, official certificate, statutory declaration or otherwise) from which he is satisfied of a change of name on the part of any person or body in whom any alienated land or interest is for the time being vested, or at whose instance a caveat has been entered in respect of any land or interest, make a memorial of the change in the relevant register document of title and in any issue document of title or other instrument relating to the said land or interest.

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C [44] In my view, having decided in 1997 that the late Rokiah is the owner and having decided that the name of the late Bacha be deleted on the title and the name of the late Rokiah be so registered, there was certainly evidence before the Registrar himself for it to have made the necessary change of the name on the title without there having to be any application of sorts and in my view no fault should lie on the plaintiff on account of the Registrar's failure to do so on its own accord after the clear decision made during the enquiry/rehearing.

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[45] In my view, having knowledge of the said 1997 decision, the defendants should not be allowed to take advantage of the situation when the said land office mistakenly issued the title in the name of the late Bacha and not in the name of the late Rokiah. In my opinion, notwithstanding that the land office did not register the name of the late Rokiah and neither did the plaintiff take any action to rectify the register, the fact still remains that the defendants have no beneficial interest whatsoever on the said land pursuant to the decision of the Land Titles Office in 1997.

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F [46] Although the title was not registered in the name of the late Rokiah, it remains undisputed that there has been a conclusive decision by a competent authority that the said land belongs to the late Rokiah. The first and second defendants clearly were aware at all material times that they do not have any good title to the said land and that it did not belong to them. As such, at the time the first and second defendants obtained the vesting Order on 29 September 2011, they had no good title to be registered in their names at that juncture. In fact, the first and second defendants had in my view misled the court when they applied for the vesting order in 2011 when they failed to highlight to the court the previous proceedings and the decision made by the Deputy Director of Land Titles in 1997. If the High Court in 2011 have been appraised of this fact, I am certain that the High Court would not have issued the vesting order as it did on an *ex parte* basis.

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[47] Therefore, from the facts of this case, I am of the considered view that the plaintiff has successfully proven that the first and second defendants have committed fraud when they obtained the vesting order on 21 September 2011 and subsequently, vesting the said land in their names and thereafter selling the said land to the third defendant on 6 February 2020 when at the material

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time, the first and second defendants are aware that they are not the beneficial owners. In my considered view, this fraudulent conduct of theirs was further exacerbated by their conduct in purporting to sell the said land to the third defendant in 2014 and thereafter, waiting several years for the plaintiff's private caveat to expire before proceeding to transfer the said land to the third defendant and registering the said transfer only on 6 February 2020.

[48] In my view, the plaintiff has clearly made out and proven the claim for tort of deceit committed by the first and second defendants.

[49] As such, having determined that the first and second defendants have committed or perpetrated fraud and deceit leading to the registration of ownership in their names, their title over the said land becomes defeasible.

[50] At this juncture, it is apt that I refer to the Latin maxim of *nemo dat quod non habet* explained in the case of *Facial Complex Sdn Bhd v. Bank Simpanan Nasional* [2022] CLJU 1245; [2022] 1 LNS 1245; [2022] MLJU 1194 as follows:

[59] *Nemo dat quod non habet* sometimes called the *nemo dat* rule, is founded on the maxim "*Nemo plus juris ad alium transferre potest quam ipse habet*", which means "one cannot transfer to another more rights than they have" It literally means "no one gives what they do not have". It simply provides that the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title.

[51] Applying the abovementioned Latin maxim, the purchase of the said land from the first and second defendants whom have no ownership right to it also denies the third defendant purchaser any ownership title.

[52] Since the first and second defendants' title on the said land is defeasible and defeated *ab initio* pursuant to s. 340(2)(a) of the National Land Code, it would also follow that the title transferred to the third defendant is also liable to be set aside unless the third defendant is able to establish that they are subsequent *bona fide* purchasers for valuable consideration pursuant to the proviso under s. 340(3) of the National Land Code which is the next issue I will consider herein.

[53] As such, the first issue is answered in the affirmative where I have no hesitation in concluding that the first and second defendants have committed fraud and had acted deceitfully in transferring the said land to their names and subsequently in the name of the third defendant *vide* the sale and purchase agreement. I now move on to the second issue *ie*, whether the third defendant has indefeasible title over the said land.

Second Issue: Whether The Third Defendant Has Indefeasible Title Over The Said Land

[54] It is trite that Malaysia adopts the Australian Torrens system where registration of title is everything. The indefeasibility of title is the hallmark of the Torrens system of land titles which was later adopted under s. 340 of

A the National Land Code with certain exceptions, for the indefeasibility of registered titles or interests in land and registered leases, charges and easements.

B [55] To this end, it is pertinent that I refer to the *locus classicus* case of *Teh Bee v. K Maruthamuthu* [1977] CLJU 134; [1977] 1 LNS 134; [1977] 2 MLJ 7 (which was followed in the case of *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; [2021] MLJU 739) where the Federal Court held as follows:

C ... Section 89 of the National Land Code which provides for the conclusiveness of a register document of final title and section 92 which declares its indefeasibility are extended to apply to a register document of qualified title as well by virtue of sections 178(3) and 176(2) of the Code. *Indefeasibility of title is the hall-mark of the Torrens system of registration of land titles and out Land Code which is based on this system provides, with certain exceptions, for the indefeasibility of registered titles or interests in land and registered leases, charges and easements under section 340 ...*

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It will be seen that the act of registration per se is paramount and when registered a title becomes indefeasible and remains so unless and until declared otherwise by the court which can only be done if the title can be successfully challenged within the somewhat restricted scope of the exceptions stated in section 340.

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 ... Under the Torrens System the register is everything. So, said S.K. Das on page 102 of his book on *The Torrens System in Malaya*. I need only refer to two Privy Council cases, *Creelman & Anor v. Hudson Bay Insurance Company* [1920] AC 194 and *Alan Frederic Frazer v. Douglas Hamilton Walker* [1967] 1 AC 569 which decided to the same effect.

F In *Creelman & Anor. v. Hudson Bay Insurance Company* which was an appeal from British Columbia, Lord Buckmaster delivering the judgment of the Judicial Committee said on page 197:

G Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in section 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.

H In *Alan Frederic Frazer v. Douglas Hamilton Walker* which was an appeal from New Zealand Lord Wilberforce said on page 580:

I It is in fact the registration and not its antecedents which vests and divests title. "... (emphasis added)

[56] Section 89 of the National Land Code also provides for the conclusiveness of a registered document of final title. A

[57] It is undisputed that based on the land search dated 27 November 2020, the third defendant is currently named as the registered owner of the said land and he is conferred with indefeasible title of the said land pursuant to s. 340 of the National Land Code. B

[58] However, a title will be rendered defeasible if it falls under one of the categories provided under s. 340(2) of the National Land Code as follows:

Section 340 of the National Land Code reads as follows:

Registration to confer indefeasible title or interest, except in certain circumstances 340. C

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible. D

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or E

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. F

(2) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and G

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. H
(emphasis added)

[59] The third defendant contends that it is a *bona fide* purchaser for valuable consideration. On the contrary, the plaintiff contends that the overwhelming evidence would lead one to the conclusion that the third defendant is not a *bona fide* purchaser for valuable consideration. The I

A primary basis for the plaintiff's contention is that the third defendant clearly had knowledge of the late Rokiah's interest and the dispute on the said land prior to selling it to the third defendant.

B [60] To this end, reference is made to the case of *Lee Siok Ching v. Eden Realty Sdn Bhd & Ors* [2021] CLJU 901; [2021] 1 LNS 901; [2021] MLJU 1020 where the High Court cited the Federal Court case of *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711 which held as follows:

C [48] Therefore a purchaser who is not guilty of any fraud but *who has knowledge that his predecessor's title or interest is tainted with fraud is not entitled to the benefit of the proviso under s. 340(3)*. In the circumstance of that case, it was held that *mere knowledge of the fraud would suffice to negate good faith.* (emphasis added)

D [61] Similarly, in the case of *T Sivam Tharamalingam v. Public Bank Bhd* [2018] 6 CLJ 1; [2018] 5 MLJ 711, the Federal Court held as follows:

E (2) A subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title. Therefore, between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land. Indefeasibility is conferred on the current registered proprietor, and not a former registered proprietor. This is a statutory protection accorded to a subsequent acquirer of interest. (para 38)

F (3) *The law recognises and enforces an overriding rule that in making and carrying out a conveyancing transaction that commonly deals with a number of transactions and dealings to transfer real property, parties should act in good faith.* The element of good faith depends upon the circumstances of the case. It is not enough for a purchaser to merely show absence of fraud, deceit or dishonesty; *knowledge of a dispute as to the ownership of property and knowledge of fraud allegation, for example, could vitiate good faith.* (para 50)

G (4) It was clear from the letter to the solicitor dated 25 July 2006 by Messrs Ramesh, Vassn & Co, acting for the deceased, that the solicitor had explicit knowledge of the existence of an adverse or rival claim on the land, and more importantly, of the allegation that 'the transfer of the said property from Nagamuthu a/l Periasamy to your client was conducted fraudulently'. Hence, the solicitor was actively involved in the dispute as to the ownership of the land between the deceased and Nagarajan. (paras 54 & 55)

H (5) The general law of principal and agent is applied to the actual facts herein to answer the question as to whether the knowledge of the solicitor should be imputed to the chargee bank. Imputed knowledge, where it operates, deems the principal to have the actual knowledge, which the agent has. It is irrefutable that the

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relationship between the defendant and the solicitor was that of a principal and agent. It is well settled law that the knowledge of a solicitor is regarded by law as the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. (paras 59-61)

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- (6) An exception to the principle that the knowledge of a solicitor is the knowledge of the client is only admitted where the agent (or solicitor) is complicit in the said fraud. Where the solicitor was not complicit in the fraud but had knowledge of the same, that knowledge must be imputed to the defendant. Hence, the knowledge of the solicitor herein was the knowledge of the defendant and the defendant was bound by it. The defendant granted the loan and proceeded to register the charge, knowing through the solicitor that there was a serious dispute as to the ownership of the land and that there was serious allegation that Nagarajan obtained title to the land by fraud. The defendant could not say that it was not aware of the dispute and the fraud allegation. (paras 67, 69 & 73)

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- (7) The knowledge of facts of the solicitor acquired in the earlier transaction must be imputed to the defendant in the course of acting for the defendant in the conveyancing transaction, although the defendant was not interested in the earlier transaction. The solicitor's knowledge of facts was acquired in a transaction on the same piece of land and the two transactions were immediately consequent on one another and were very closely connected that the first must obviously have been still present in the solicitor's mind. The defendant was therefore infected with the knowledge that there was a serious dispute as to the ownership of the land. This type of knowledge would affect the good faith of the defendant and hence, the status of holder of interest in good faith was lost. (paras 86 & 88)

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- (8) *In the face of the suspicious and uncertain circumstances under which the transaction was transacted, the defendant still proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries.* The courts would be slow to assist a chargee who failed to take ordinary precautions that ought to have been undertaken before registering the charged land and, as such, are not entitled to the protection of the court. Further, *the element of 'carelessness and negligence' also negated good faith on the part of the defendant. Therefore, the defendant lacked good faith in the entire transaction and thereby its statutory defence of being a purchaser in good faith under the proviso to s. 340(3) of the NLC was defeated.* The charge created in favour of the defendant was therefore defeasible. (paras 88, 90 & 91) (emphasis added)

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[62] From the abovementioned case of *T Sivam (supra)*, the Federal Court has provided a list of non-exhaustive factors which can vitiate a purchaser's good faith and render the title registered to be defeasible. These include:

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- A (i) carrying out conveyancing transaction without good faith;
- (ii) knowledge of a dispute as to the ownership of property;
- (iii) knowledge of fraud allegation;
- (iv) proceed with the conveyancing transaction in the face of the suspicious
- B and uncertain circumstances without making further inquiries; or
- (v) carelessness and negligence.

[63] The plaintiff submits that the third defendant is not a *bona fide* purchaser for valuable consideration and contends as follows whilst highlighting the following circumstances:

Pre-SPA

- (i) since year 2000, DW3 had started to negotiate the sale and purchase of the said land with DW1 and DW2 *albeit* the final title of the said land has yet to be issued at the material time;
- D (ii) although the final title of the said land was issued on 1 September 2009, at no point in time did DW1 and DW2 have actual possession of the issue document of title. Notwithstanding that, DW3 took the risk and proceeded with the purchase of the said land;
- E (iii) DW3 testified that he knew DW1 and DW2 are the owners of the said land based on the land search conducted in the year 2011 (see pp. 237 to 238 of the notes of proceedings dated 7 December 2023). However, it is apt to note that DW1 and DW2's names were only registered on 18 October 2019 and this was admitted by DW3;
- F (iv) DW3 has knowledge that DW1 and DW2 are not occupying the said land and there were other occupiers on the said land but no investigation or enquiries was made before executing the sale and purchase agreement (See p. 250 of the notes of proceedings dated 7 December 2023). DW3 had only sent his representatives to visit the
- G said land and talked to the occupiers after the third defendant became the registered owner of the said land (see p. 276 of the notes of proceedings dated 7 December 2023). In fact, the sale and purchase agreement states that the vendor (the first and second defendants) have to remove the private caveat registered on the said land;
- H (v) both PW1 and DW3 admitted that they knew about the registration of the plaintiff's private caveat pursuant to the land search conducted on 20 October 2010 (see pp. 10 and 254 of the notes of proceedings dated 6 and 7 December 2023) *ie*, prior to the execution of the sale and purchase agreement and no attempts were made to ask the plaintiff
- I about the registration of the private caveat (see p. 269 of the notes of proceedings dated 7 December 2023). There were also no attempts made to remove the private caveat;

- (vi) despite all of the above suspicious and uncertain circumstances, the third defendant still proceeded to execute the sale and purchase agreement and paid the deposit sum of RM36,176.58 to DW1 and DW2 on 24 April 2011; A

Post-SPA

- (vii) despite the execution of the sale and purchase agreement, DW1 and DW2 failed to remove the plaintiff's private caveat pursuant to cl. 3(xiii) of the sale and purchase agreement. This was not done by DW1 and DW2 since 24 June 2011 and DW3 took no action against DW1 and DW2 for the breach of the sale and purchase agreement. Surprisingly, the defendants waited until 17 April 2019 where a land search was thereafter conducted by PW1 which reflect the lapse of the plaintiff's private caveat whereafter the third defendant immediately proceeded to execute the Form 14A on 14 May 2019 to register the said land unto their name. The reason for such an inordinate delay is unreasonable given that the third defendant as a prudent purchaser would want their name to be registered on the title within reasonable time upon execution of the sale and purchase agreement in 2014; B
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D
- (viii) the plaintiff further submits that the non-removal of the plaintiff's private caveat was to actuate the *modus operandi* of the defendants, *ie*, to sell the said land to the third defendant without notifying the plaintiff; E
- (ix) DW3's intention and plans can be seen when they conducted a land search on 24 August 2018 and noticed that the plan did not go well because it was expected that the plaintiff's private caveat which was lodged on 24 August 2010 should have lapsed at that time, but it did not. This has prompted the third defendant to lodge their private caveat instead on 5 September 2018 while waiting for the plaintiff's private caveat to lapse; F
- (x) DW3 knew that the plaintiff has rights over the said land which he admitted during trial that the purpose of a caveat is to protect one's rights (see pp. 260 to 261 of the notes of proceedings dated 7 December 2023). Knowing the plaintiff has rights on the said land, DW3 had still recklessly and blatantly disregarded the plaintiff's rights and purchased the said land; G
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- (xi) DW3 also testified that a normal conveyancing transaction to purchase a piece of land would take four months to complete (see p. 236 of the notes of proceedings dated 7 December 2023). However, in this case, it took almost 20 years from the negotiations between the defendants until the transfer of the said land to the third defendant. Even if one were to take into account the date of the execution of the sale and I

- A purchase agreement dated 22 June 2011, it is a gap of almost ten years. This is again suspicious and uncertain circumstances that DW3 should make enquiries, which he failed to do so. The third defendant only attempted to make enquiries after its name was registered which suggests that the enquiries could have been made during those 20 years but was not done so. Bearing in mind, the third defendant is a property developer established since 1999 with several development projects (see p. 232 of the notes of proceedings dated 7 December 2023) and not some individual purchaser who is not experienced in land transactions, it is reasonable to expect that as a prudent purchaser, he must ensure that the land is free from any encumbrances or restriction prior to the purchase of the said land;
- B
- C (xii) the third defendant could have extracted the plaintiff's private caveat or for that matter Form 19B to look at its content anytime since he had noticed since year 2010, but did not do so. That is so when the third defendant had conducted land search on the said land for so many times during that period and even entered a private caveat themselves. If the third defendant discovered the contents of the plaintiff's caveat prior to 24 June 2011, the third defendant would not have proceeded with the purchase of the said land;
- D
- E (xiii) in the event the sale and purchase agreement had been concluded, the third defendant could have terminated the sale and purchase agreement when he had the chance and when the transfer of the said land which ought to be completed within four months as per DW3's testimony was being delayed for almost ten years due to the breach of DW1 and DW2's contractual duty to remove the plaintiff's private caveat;
- F
- (xiv) no reasonable man would purchase a land if it cannot be registered under one's name;
- (xv) the third defendant is clearly ignorant, reckless, careless and negligent;
- G **Post-Registration**
- (xvi) although the plaintiff has lodged a fresh private caveat on the said land on 24 August 2020, the third defendant again did nothing to remove the plaintiff's private caveat but proceeded to issue the notice to quit on 4 September 2020.
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- I [64] Further, I also note that cl. 2(b) of the said sale and purchase agreement provides for the first and second defendants to obtain the sanction of the court for the purpose of the sale but none appears to have been obtained. It has also not escaped my attention that this was pleaded in their statement of defence as well as their case summary that sanction of the court had to be obtained and was an important term for the purposes of the sale but yet sanction was not obtained.

[65] Further, I note that the payment of the purchase price is also sketchy following the discrepancies in the actual amount paid by the third defendant to the first and second defendants. As pointed out by the plaintiff in her written submission, the second defendant (DW1) at question and answer no. 11 of his witness statement (WSDW1) testified that the first and second defendants sold the said land to the third defendant for a total sum of RM361,176.58. However, DW1 testified during cross-examination that he does not know the amount of the purchase price of the said land as it was handled by his solicitor (see pp. 173 to 175 of the notes of proceedings dated 6 December 2023). Quite clearly, there was material discrepancies between his testimony that he only received RM2,000 to RM4,000 (see p. 157 of the notes of proceedings dated 6 December 2023) and his testimony of receiving a sum of RM100,000 or RM98,000 by the first defendant and himself (see pp. 174 to 178 of the notes of proceedings dated 6 December 2023). This in my view raises doubt on the suspicious sale and purchase transaction entered into by parties.

[66] In addition, as highlighted earlier, it is clear that there was a gap of many years between the execution of the sale and purchase agreement between the first and second defendants and the third defendant on 11 July 2014 and the register on 6 February 2020. In cases of sale and purchase, it is common for the purchaser to want to have his name registered on the title as soon as possible but this was not the case here.

[67] Further, it is trite that the third defendant as a reasonable and prudent purchaser ought to have taken the ordinary precaution to investigate and conduct a search on the title of the said land before executing the said agreement. Quite clearly, there were encumbrances on the said land and if the third defendant were to conduct a land search, the private caveat would be reflected on the said search. The Form 19B affirmed by the plaintiff would also give the third defendant sufficient knowledge that there was an allegation of fraud and suspicions and uncertain circumstances. (See cases of *Mohd Najid Yusof v. Mak Offshore Sdn Bhd & Ors* [2023] CLJU 512; [2023] 1 LNS 512; [2023] 4 MLRH 228; *Ib Capital Sdn Bhd v. Ivory Indah Sdn Bhd & Anor* [2021] CLJU 2348; [2021] 1 LNS 2348; [2022] 1 MLJ 860 and *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141).

[68] As such, having considered the facts and circumstances surrounding the execution of the sale and purchase agreement and the subsequent transfer of the said land to the third defendant, I am of the considered view that the third defendant has failed to satisfy this court that it is a *bona fide* purchaser for valuable consideration.

[69] As such, the vesting order obtained in the names of the first and second defendants are tainted with fraud leading to the defeasible title in the first and second defendants' names and the subsequent transfer to the third defendant

A is not protected under the proviso to s. 340(3) of the National Land Code as the third defendant has failed to prove that it is a *bona fide* purchaser for valuable consideration.

[70] I would therefore answer the second question in the negative.

B **Third Issue: Whether The Third Defendant Is Entitled To Vacant Possession Over The Said Land**

[71] Having determined the above issue, I am of the considered view that the plaintiff in Suit No. 32 is not entitled to vacant possession given that such registration is defeasible.

C **What Now? – The Appropriate Remedy To Be Granted – Whether Title Ought To Be Transferred To/In The Name Of The Late Rokiah?**

Fourth Issue: Whether The Plaintiff Is Entitled To Claim General And Aggravated Damages Against The Defendants?

D [72] It is trite that the purpose of damages is to restore the plaintiff to its original position pursuant to the principle of *restitutio in integrum* as seen in the case of *Antonina Marleen Yarendra v. Chai Wei Chung* [2017] CLJU 536; [2017] 1 LNS 536 where the Court of Appeal held as follows:

E Further and in any event, the Court's discretion in matters of compensation is exercised according to established principles of compensation awarded for a wrongful act. Monetary compensation is generally awarded to compensate, so far as money can compensate and give reparation for the wrongful act done. *Its intent is to restore the claimant to the original position*; hence the principle of compensation *restitutio in integrum*. This principle has been well set down in two oft-quoted decisions of the Federal Court. First, in *Rasidin bin Partorio v. Frederick Kiai* [1976] 1 LNS 123; [1976] 2 MLJ 214 where Wan Suleiman FJ stated:

The principle for assessing damages has been stated by Viscount Dunedin in *Admiralty Commissioners v. SS Susquehanna* as follows:

G ... the common law says that damages due ... for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act ...

Second, in *Ong Ah Long v. Dr S Underwood* [1983] CLJ Rep 300; [1983] 2 MLJ 324 where Syed Agil Barakbah FJ said:

H Damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give reparation for the wrongful act and for all the natural and direct consequences for the wrongful act, so far as money can compensate. *British Transport Commission v. Gourley (supra)* and *H West & Son Ltd v. Shepard* [1963] 2 All ER 625. The award under general damages should be a global sum commensurate with the injury sustained

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and not a full compensation which might result in ruinous consequences to the defendant (per Sir Alexander Cockburn LJ in *Phillips v. South Western Railway Co* (1879) 4 QBD 406).
(emphasis added) A

[73] The plaintiff submits that if this court finds that the third defendant is not a *bona fide* purchaser for valuable consideration and decides that the said land be reverted back to Rokiah's estate, then save and except for the legal costs and time incurred, the plaintiff will be put back to the original position and will only pray for nominal damages to cover the costs for the legal proceedings, if allowed. B

[74] In this respect, the plaintiff refers to the case of *Chin Min Hua & Ors v. Egaivallinayagi Ammal* [2023] 5 CLJ 445, where it was held as follows: C

[46] Considering the factual circumstances of this suit, I am of the view that legal fees and expenses should be a component of the damages awardable to the defendant. In other words, the legal fees incurred by the defendant, due to the acts or conduct of the plaintiffs, constitute the damages suffered by the defendant. D

[75] Further, in *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229, the Court of Appeal held:

Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. Although this is one of many situations in which nominal damages may be awarded, 'it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss' (see *McGregor on Damages*, Chapter 10). E

In the instant case, the issue is one of proof rather than absence of loss. It is an absence of evidence of the amount of loss. F

As Lord Halsbury LC succinctly stated in *The Mediana* [1900] AC 113: ... Nominal damages is a technical phrase which means that you have negated anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. G

In the instant case, we find that the respondent has clearly failed to prove this loss which was allegedly suffered from the appellant's breach of contract. In a situation where there is an infringement of a legal right such as this but where there is no basis for ascertainment of the amount of loss suffered, a nominal damage may be awarded (see *Sykes v. Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113). H

[76] Quite clearly, from the sale of the said land to the third defendant, the estate of the late Rokiah has been deprived of the use and enjoyment of the said land. Although damage is shown, but if the amount suffered is not I

A proven sufficiently or at all, a court will usually award nominal damages and this is what I intend to do so in this case as no damages have been proven as conceded by the plaintiff. (See the case of *Koperasi Kastam Diraja Malaysia Bhd v. Yi Go Group Sdn Bhd* [2021] 10 CLJ 31; [2021] 5 MLJ 590).

Conclusion

B [77] Upon a careful and judicious consideration of the circumstances of the case, I am of the considered view that the plaintiff's claim in Suit No. 12 be allowed whereas the claim in Suit No. 32 is dismissed with no order as to costs.

C [78] I will allow the claim/relief sought by the plaintiff in Suit No. 12 as follows:

(i) an order that the sale of Lot 11, Bandar Georgetown, Seksyen 5, Daerah Timor Laut, Pulau Pinang and held under Geran No. 110388 *vide* sale and purchase agreement dated 11 July 2014 between the defendants is set aside;

D (ii) a declaration that the vesting order obtained on 21 September 2011 which was registered *vide* Perserahan No. 0799B2019010875 on 18 October 2019 on Lot 11, Bandar Georgetown, Seksyen 5, Daerah Timor Laut, Pulau Pinang and held under Geran No. 110388 is null and void;

E (iii) an order that the name Rokiah binti Abdullah (No. K/P: 1844174) be registered on the title as a registered proprietor of the said land;

(iv) land office gives effect to these orders; and

F (v) nominal damages of RM1,000.

[79] As for costs, I will exercise my discretion and allow costs of RM20,000 as requested by the plaintiff to be paid by the first and second defendants to the plaintiff subject to allocatur.

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